

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original

11-7079

To be argued by
LEONARD KOERNER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

F.X. MALTZ, LTD.

Plaintiff-Appellant,

-against-

ROBERT MORGENTHAU, Individually and as District
Attorney of the County of New York and MICHAEL
Codd, Individually and as Police Commissioner
of the City of New York,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE Codd

W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for Appellee Codd,
Municipal Building,
New York, N.Y. 10007.
566-3322 or 4337

L. KEVIN SHERIDAN,
LEONARD KOERNER,
of Counsel.

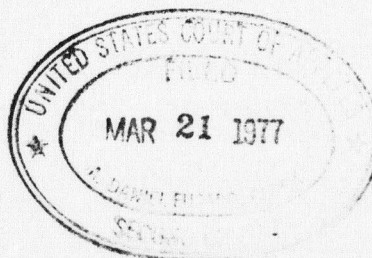


TABLE OF CONTENTS

	Page
Statement	1
Questions Presented	1
Facts	2
Opinion Below	4
Argument	

THE PLAINTIFF, A THEATRE OWNER, HAS NOT SHOWN A SUFFICIENT CASE OR CONTROVERSY TO CHALLENGE THE ALLEGED PRACTICE OF POLICE OFFICERS WITH RESPECT TO LIVE NUDE DANCE PERFORMANCES AT THE THEATRE WHERE THE PLAINTIFF, AT THE TIME OF THE LAWSUIT, HAD NOT HIRED ANY DANCERS NOR HAD ANY OF ITS EMPLOYEES BEEN THE OBJECT OF A CRIMINAL PROSECUTION AS A RESULT OF SUCH LIVE NUDE PERFORMANCES.

ASSUMING, ARGUENDO, THAT THERE IS A SUFFICIENT CASE OR CONTROVERSY THE COMPLAINT WAS PROPERLY DISMISSED FOR FAILING TO STATE A CAUSE OF ACTION.	5
Conclusion	10

TABLE OF AUTHORITIES

Cases cited:

<u>Attwood v. Purcell</u> , 402 F. Supp. 231 (D. Ariz., 1975, three judge court)	7,8,9
<u>Broadrick v. Oklahoma</u> , 413 U.S. 601 (1973)	6,7
<u>California v. LaRue</u> , 409 U.S. 109 (1972)	8
<u>Dombrowski v. Pfister</u> , 380 U.S. 479 (1965)	6
<u>Ellis v. Dyson</u> , 421 U.S. 426 (1975)	5
<u>Marcus v. Search Warrants</u> , 367 U.S. 717 (1961)	8

TABLE OF AUTHORITIES

	Page
<u>Milky Way Productions, Inc. v. Leary</u> , 305 F. Supp. 288 (S.D.N.Y., 1969, three judge court), affd. 397 U.S. 98 (1970)	9
<u>O'Shea v. Littleton</u> , 414 U.S. 488 (1974)	5
<u>Paris Adult Theatre I v. Slaton</u> , 413 U.S. 49 (1973)	8
<u>People v. Morgan</u> , 86 Misc 2d 377 (N.Y. Crim. Ct., 1976)	9
<u>Steffel v. Thompson</u> , 415 U.S. 452 (1974)	5
<u>206 East 52nd Rest. Corp. v. City of New York</u> , 86 Misc. 2d 1048 (Sup. Ct., N.Y. 1976)	9
<u>United States v. O'Brien</u> , 391 U.S. 367 (1968)	8
Statutes cited:	
McKinney's N.Y. Penal Law Section 235.05	6,8
McKinney's N.Y. Criminal Procedure Law Section 140.10	6,7

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

F.X. MALTZ, LTD.

Plaintiff-Appellant,

-against-

ROBERT MORGENTHAU, Individually and as
District Attorney of the County of New
York and MICHAEL CODD, Individually and
as Police Commissioner of the City of
New York,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW
YORK

BRIEF OF APPELLEE CODD

STATEMENT

In a civil rights action, the plaintiff appeals from a judgment of the District Court for the Southern District of New York (WYATT, J.), entered on January 26, 1977, which denied plaintiffs' motion for summary judgment and granted defendants' motions to dismiss the complaint.

QUESTIONS PRESENTED

1. Does a theatre owner have a case or controversy sufficient to challenge the alleged practices of police officers with respect to live nude dance performances at the theatre where the plaintiff, at the time of the lawsuit, had

not hired any dancers nor had any of its employees been the object of a criminal prosecution as a result of such live nude performances.

2. Assuming, arguendo, that there is a sufficient case or controversy, has the plaintiff stated a claim for relief?

FACTS

(1)

This action was commenced on December 6, 1976, by order to show cause, pursuant to the Civil Rights Act, 42 U.S.C. §§1983 et seq. The action sought to have Section 140.10 of the Criminal Procedure Law declared unconstitutional on its face and as applied to the plaintiff. Section 140.10 authorizes a police officer to arrest a person for "(a) any offense when he has reasonable cause to believe that such person has committed such offense in his presence."

(2)

The plaintiff is an operator of a theatre located at 124 West 43rd Street in the Borough of Manhattan (6).* The theatre exhibits sexually oriented feature length motion pictures (7). In addition, plaintiff desires to offer its patrons "dance exhibitions performed by professional dancers who will have no function other than to dance on a stage provided for such purpose" (7). The

Unless otherwise indicated, numbers in parentheses refer to pages in the Joint Appendix.

performances will involve "non obscene topless and even nude choreographed performances by male and female dancers ***"(7).

The complaint alleged that live dance performances by totally or partially clothed dancers are performed in theatres in midtown Manhattan (7). It further alleged that during the months of September, October and November 1976, police officers, under the direction of Police Commissioner Codd, have continuously entered theatres which have live shows and, without warrants, arrested the dancers "thereby limiting the performances" (7). Many of these theatres have been subjected to over "a half dozen arrests in a period of ten weeks, causing dancers to refuse employment in such theatres ***" (8).

As a consequence of these arrests, the plaintiff's right to produce shows with similiar live dance entertainment has been chilled (8).

The complaint requested the convening of a three judge court, a judgment declaring Section 140.10 of the New York Criminal Procedure Law unconstitutional on its face and as applied and preliminary and permanent injunctions (p. 11-12).

In support of the application for a preliminary injunction, Ernesto Velazquez, the operator of the theatre at 124 West 43rd Street in Manhattan submitted an affidavit (15). Mr. Velaszquez stated that there has been a proliferation of theatres and bars in the midtown area of Manhattan offering live topless dance entertainment to their patrons (16).

As a result, theatres which do not offer such entertainment have lost patronage (16, 17). The plaintiff desires to offer its patrons live dance performances by professional dancers performing choreographed routines (17). The plaintiff has not yet begun offering such performances because of the chilling effect of the warrantless arrests by the New York City police officers of dancers in other theatres and bars (16, 17, 18).

On December 13, the plaintiff withdrew his application for a preliminary injunction, without prejudice (2).

By motions returnable January 21, 1977, the defendants, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moved to dismiss the complaint (22, 24).

The plaintiff apparently made an oral motion for summary judgment.*

OPINION BELOW

In granting the defendants' motions to dismiss, the Court stated (26):

"There is nothing to show that if plaintiff employs nude dancers they would violate the law by obscene performances or that if they do the police will arrest them. If despite my views there is a case or controversy, I find the statute constitutional on its face and as applied in the case of plaintiff operators."

*The defendants urged that no motion for summary judgment had been made. In its opinion, the Court assumed that such a motion had been made and denied the motion (26).

ARGUMENT

THE PLAINTIFF, A THEATRE OWNER, HAS NOT SHOWN A SUFFICIENT CASE OR CONTROVERSY TO CHALLENGE THE ALLEGED PRACTICES OF POLICE OFFICERS WITH RESPECT TO LIVE NUDE DANCE PERFORMANCES AT THE THEATRE WHERE THE PLAINTIFF, AT THE TIME OF THE LAWSUIT, HAD NOT HIRED ANY DANCERS NOR HAD ANY OF ITS EMPLOYEES BEEN THE OBJECT OF A CRIMINAL PROSECUTION AS A RESULT OF SUCH LIVE NUDE PERFORMANCES.

ASSUMING, ARGUENDO, THAT THERE IS A SUFFICIENT CASE OR CONTROVERSY THE COMPLAINT WAS PROPERLY DISMISSED FOR FAILING TO STATE A CAUSE OF ACTION.

(1)

Article III, Section 2, clause 1 of the United States Constitution limits the exercise of judicial power to "cases and controversies." To establish a sufficient case or controversy, the plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action. The injury or threat of injury must be "both real and immediate not conjectural or hypothetical". O'Shea v. Littleton, 414 U.S. 488, 493-494 (1974); Ellis v. Dyson, 421 U.S. 426, 434-435 (1975); Steffel v. Thompson, 415 U.S. 452 (1974).

With respect to the related issues of case or controversy and standing, an exception has been carved out for causes of action based on the First Amendment. In such cases, the Supreme Court has permitted attacks on overly broad statutes with no requirement that the person

making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite specificity. Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). Such claims of facial overbreadth have been allowed in cases challenging statutes which regulate only spoken words. Broadrick v. Oklahoma, 413 U.S. 601 (1973). The overbreadth doctrine employed by the Supreme Court is used "sparingly and only as a last resort" to permit litigants to (413 U.S. at p. 612)

"challenge a statute [on its face] not because their own rights of free expression are violated but because of a judicial prediction or assumption that the statute's very existence may cause others not before the Court to refrain from constitutionally protected speech or expression."

In the instant case, the District Court properly found that the conclusory allegations in the plaintiff's complaint did not show a sufficiently real and immediate threat necessary to establish a case or controversy. The complaint alleges that the plaintiff, an operator of a theatre, seeks to offer its patrons non-obscene nude dance exhibitions (7). It further alleges that other theatres in the midtown area have offered totally nude dance performances (7). Police officers have attended performances at these theatres and have arrested the dancers for violation of the obscenity law (P.L., Sect. 235.05) pursuant to Criminal Procedure Law, Section 140.10 which authorizes a police officer to arrest where there is probable cause.

Apart from these general allegations about other theatres there is nothing linking the police activities to the plaintiff's operation (9, 17). The plaintiff has not yet hired one dancer. None of its employees have been the object of a criminal prosecution as a result of a live nude dance performance (9, 17).

The overbreath doctrine in a First Amendment case, which might establish a sufficient case or controversy in an appropriate case, is not applicable here. Such a claim applies only to spoken words not acts. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). In addition, the overbreath doctrine cannot be invoked against ordinary criminal laws that are sought to be applied to protected conduct. Id. at p. 613. The statute attacked in this case CPL, Section 140.10, is an ordinary criminal law permitting a police officer, whenever he observes any criminal activity, to arrest a person when he has reasonable cause to believe that such person has committed an offense in his presence.

(2)

Assuming, arguendo, that there is a sufficient case or controversy, the complaint was properly dismissed for failing to state a cause of action. It appears to be plaintiff's position that the warrantless arrest is improper in all cases where the First Amendment is involved. In support of his position, he cites Attwood v. Purcell, 402 F. Supp. 231 (D. Ariz., 1975, three judge court), which held that a

warrantless arrest of a topless dancer constitutes a prior restraint. We respectfully submit that Attwood is wrong. Attwood, in its analysis of the issue, did not distinguish between the various modes of communication of ideas. As the mode of expression moves from actual speech of the printed page to conduct as an expression of an idea, the scope of permissible state or federal regulation increases. See, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973); California v. LaRue, 409 U.S. 109, 117 (1972); United States v. O'Brien, 391 U.S. 367, 376 (1968). In LaRue the Supreme Court indicated that "bar room" type of nude dancing may involve a minimum of First Amendment protection. 409 U.S. at pp. 116-117.

The protection of the First Amendment afforded nude bar room dancing may require a hearing within a short time after an arrest but should not be construed to require a police officer to obtain a warrant before arrest. Unlike a book or a movie which reflects past acts, the theatre performance presents a live act which may be in violation of Section 235.05 of the Penal Law. Where the performance is obviously obscene, e.g., a performer masturbating on stage or sexually molesting a young child, a police officer should not be required to get a warrant before making an arrest. Obscene nude acts on stage are not protected by the First Amendment. See California v. LaRue, 409 U.S. 109 (1972); Marcus v. Search Warrants, 367 U.S. 717, 730-731 (1961).

The plaintiff here does not allege any evidentiary facts indicating that the police are making warrantless arrests of nude performers who are performing non-obscene dancing. To the contrary the complaint admits that the prosecutions of these performers have resulted in convictions based on New York's obscenity statute, CPL, Section 235.05. It is noteworthy that Section 235.05 has been held to be constitutional. See Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288 (S.D.N.Y., 1969, three judge court), affd. 397 U.S. 98 (1970).

The cases discussed in plaintiff's brief, with the exception of Attwood v. Purcell, supra, 402 F. Supp. 231 (D. Ariz. 1975, three judge court), involved the seizure of books, printed material and movies. As we noted above, nude bar room dancing does not rise to the same constitutional level as these other forms of expression. As a result, the principles enunciated in the seizure cases are not necessarily applicable to this case, involving the issue of a warrantless arrest for actual, live conduct, believed by the officer to be obscene. See Kew v. Senter, 416 F. Supp. 1101, 1105-1106 (D.C.N.D. Tex., 1976); 206 East 52nd Rest. Corp. v. City of New York, 85 Misc 2d 1048 (Sup. Ct., N.Y., 1976); People v. Morgan, 86 Misc 2d 377 (N.Y. Crim. Ct., 1976), where the courts upheld warrantless arrests of live performers.

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD
BE AFFIRMED, WITH COSTS.

March 18, 1977

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for Appellee Codd.

L. KEVIN SHERIDAN,
LEONARD KOERNER,
of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

being duly sworn, says, that on the 21 day of MAR., 1977
at No. 122 E. 42ND ST. in the Borough of MANH. in The City of New York, he served three copies
of the annexed BRIEF upon HERBERT S. KASSNER Esq.,
the attorney for the OPP. ATT. in the within entitled action by delivering
three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and
leaving the same with him.

Sworn to before me, this

day of

21

MAR.

1977

Brian Sueden

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Bruce Garner